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Statement of American Institute of Certified Public Accountants Concerning S. 1466 And Similar House Bills Presented to Subcommittee No. 3 of the Judiciary Committee, House of Representatives January 30, 1964

American Institute of Certified Public Accountants (AICPA)

STATEMENT OF

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

CONCERNING S.1466 AND SIMILAR HOUSE BILLS

PRESENTED TO

SUBCOMMITTEE NO. 3 OF THE JUDICIARY COMMITTEE

HOUSE OF REPRESENTATIVES

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The American Institute of Certified Public Accountants is the only national organization of certified public accountants in the United States. The present membership of the Institute is more than 48,000 with members in every state of the United States and in the District of Columbia.

The objectives of the Institute are to maintain and enhance the professional standards of the accounting profession to the end that members of the profession may render an effective service to the public in the accounting field.

The interest of the Institute in the present legislation arises out of the fact that many members of the Institute regularly engage in practice before Federal administrative agencies, particularly the Treasury Department and the Internal Revenue Service of that Department. The Treasury Department is one of the few agencies of the government which still has an established procedure for formal enrollment to practice before it. Accordingly,

the Treasury Department is an agency at which the present legislation is directly aimed.

The field of Federal tax practice has long been an area in which certified public accountants have possessed a special competence to assist taxpayers in their dealings with the Internal Revenue Service. This has resulted in assistance to the Treasury Department itself in the efficient performance of its duties in the collection of the public revenues.

For reasons to be explained later, the Institute believes that the Treasury Department should be exempted from the Bill.

The Institute believes that Section 1(a) of the Bill, dealing with the automatic admission of lawyers, is neither necessary nor appropriate insofar as it relates to the Treasury Department. Certified public accountants have not found the Treasury Department's enrollment procedure burdensome. We believe that supervision by the Treasury Department through its enrollment authority is in the public interest.

The need for supervision of those admitted to practice before the Treasury Department was explored in

great detail by the King-Kean Subcommittee in 1953. Report No. 2518 of the Ways and Means Committee, which was unanimously adopted, refers to this matter as follows:

> "The honest and able practitioner performs vital services for his client in * * * (the) area (of presentation of the taxpayer's case) with no injury to the revenue. The dishonest practitioner, on the other hand, is a constant menace to the entire tax system." (Report No. 2518, p. 13)

The Committee concluded that the enrollment procedure should be strengthened and that admission to practice should not be automatic. The Report states:

> "Your Subcommittee has ascertained that the practitioner program is presently being administered as if practice before the Treasury Department were a right rather than a privilege." (Report No. 2518, p. 16)

The Institute subscribes to the views of the Ways and Means Committee. Most of the business of the Internal Revenue Service is handled through informal conferences between Internal Revenue personnel and taxpayers and their representatives. This informal disposition of tax cases without resort to litigation must be encouraged and continued if the Federal revenue system is to work. Hundreds of millions of dollars flow between the Treasury Department and our taxpayers on the basis of

this procedure. The nature of this private and off-the-record procedure is such that comparisons with open and adversary court proceedings are inappropriate. As the Ways and Means Committee Report stated:

> "The importance of the Secretary's using this (enrollment) authority to insure the high caliber of the Treasury bar is self-evident." (Report No. 2518, p. 13)

Moreover, the Institute does not subscribe to the view expressed in Senate Committee Report No. 7045 on S. 1466 that "The relationship between the effectiveness of an advocate and that advocate's personal affairs and particularly personal tax problems is remote * * *" The Ways and Means Committee's 1953 Report also did not subscribe to this view.

The Bill does not provide solely for the automatic admission of lawyers to practice before Federal agencies. It has other provisions which are a source of great concern to certified public accountants.

A summary of the Institute's position in these other features of the Bill is as follows:

1. The Institute believes that Section 1(b), which would eliminate the Treasury Department's power

of attorney procedure is not in the interest of the taxpayers, tax practitioners or the Treasury Department.

2. Section 2 of the Bill requires that all communications be given to and by an attorney once he has appeared in a case. The Institute believes that this should be deleted from the Bill since it would deprive the taxpayer of the right to select his representatives and to assign authority to them as he deems to be in his own best interests. Hence, it would be disruptive of cooperative representation in tax matters by certified public accountants and lawyers.

3. The Institute believes that the existing power of each agency to admit non-lawyers to practice, and to discipline and disbar all practitioners, must be expressly reaffirmed lest this power be taken away unintentionally.

1. Elimination of the Power of Attorney Procedure is not in the Public Interest.

Under current procedures, evidence of authority to represent a client before the Treasury Department and to obtain information from the Treasury Department with respect to the client's affairs must be established

by filing a power of attorney signed by the client. While this may sometimes be found to be slightly inconvenient, it is, we believe, in the best interests of the taxpayer, his representatives and the Treasury Department that this requirement be maintained.

The requirement for the power of attorney gives the taxpayer the ability to specify and limit the subject matter which may be discussed by his representative with the Treasury Department. It protects employees of the Treasury Department in disclosing confidential information with respect to a taxpayer's affairs to the taxpayer's representative. It avoids the possibility of confusion as to which representative of a taxpayer has responsibility for and authority with respect to a specific tax matter. For the reasons stated above, the Institute believes it in the public interest to retain the power of attorney procedure with respect to all practitioners before the Treasury Department.

2. Section 2 of the Bill will be Disruptive of Cooperative Representation in Tax Matters by Lawyers and Non-Lawyers.

Section 2 of the Bill states that when an individual is represented by an attorney "any notice or other

written communication required or permitted to be given to or by such participant shall be given to or by such attorney." Simply stated, where both an attorney and a certified public accountant are representing a taxpayer in a matter before the Internal Revenue Service (which frequently occurs), only the lawyer -- irrespective of the wishes of the taxpayer -- may give communications to or receive them from the agency.

The field of Federal tax practice before the Treasury Department has been the subject of extended consideration and negotiation by and between representatives of the American Bar Association and the Institute over a number of years. This has resulted in the adoption of a Joint Statement of Principles Relating to Practice in the Field of Federal Income Taxation. (This statement appears on pp. 10-15 of the attached booklet.)

The Joint Statement recognizes the competence of both lawyers and certified public accountants in the field of Federal tax practice and recommends the desirability of cooperation between the two professions. Thus, Section 1 of the Joint Statement entitled "Collaboration of Lawyers and Certified Public Accountants" states in part:

> "Many problems connected with business require the skills of both lawyers and certified public accountants and there is every reason for a close and friendly cooperation between the two professions. Lawyers should encourage their clients to seek the advice of certified public accountants whenever accounting problems arise and certified public accountants should encourage clients to seek the advice of lawyers whenever legal questions are presented."

Section 6 of the Joint Statement entitled "Representation of Taxpayers before Treasury Department" states:

> "Under Treasury Department regulations lawyers and certified public accountants are authorized, upon a showing of their professional status, and subject to certain limitations as defined in the Treasury rules, to represent taxpayers in proceedings before that Department. If, in the course of such proceedings, questions arise involving the application of legal principles, a lawyer should be retained, and if, in the course of such proceedings accounting questions arise, a certified public accountant should be retained."

In 1956, the Secretary of the Treasury, in an Interpretation of Treasury Department Circular 230, commented with favor on the progress toward cooperation in matters of Federal tax practice which had been made by members of the legal and accounting professions. In this Interpretation (see pp. 7-9 of the attached document), the Secretary of the Treasury stated:

> "The Department has properly placed on its enrolled agents and enrolled attorneys the responsibility of determining when the assistance of a member of the other profession is required. This follows from the provisions in section 10.2(z) that enrolled attorneys must observe the canons of ethics of the American Bar Association and enrolled agents must observe the ethical standards of the accounting profession. The Department has been gratified to note the extent to which the two professions over the years have made progress toward mutual understanding of the proper sphere of each, as for example in the Joint Statement of Principles Relating to Practice in the Field of Federal Income Taxation.
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> "The question of Treasury practice will be kept under surveillance so that if at any time the Department finds that the professional responsibilities of its enrolled agents and enrolled attorneys are not being properly carried out or understood, or that enrolled agents and attorneys are not respecting the appropriate fields of each in accordance with that Joint Statement, it can review the matter to determine whether it is necessary to amend these provisions of the Circular or take other appropriate action."

Section 2 would deprive a taxpayer of the power to designate the representative with primary responsibility for a tax matter if he chooses to be represented by both a lawyer and a certified public accountant. Moreover, since Section 2 requires that papers must be served on or by the lawyer once he has appeared in a matter, Section 2 would be an obstacle to continued cooperation between the legal and accounting professions. Consequently,

we believe that this section of the Bill should be deleted and the question of the service of papers left to each agency.

3. The Existing Power of each Agency to Admit Non-Lawyers to Practice and to Discipline and Disbar all Practitioners must be Expressly Reaffirmed.

The Joint Statement and Treasury Department Interpretation referred to above were the culmination of years of effort by leaders of the legal and accounting professions to promote harmonious working relationships between the two groups. Previously, certain members of the legal profession had sought to eliminate the historical right of certified public accountants to represent taxpayers before the Treasury Department. Obviously, the Institute is quite concerned with any action which might have the effect of restricting the right of non-lawyers to practice before government agencies.

We note that Subdivision (i) of Section 1(c) of the Bill provides that nothing in the Bill shall be construed "to grant or deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding." For the reasons detailed below, we believe that the Bill must

contain an express grant of power to the agencies to admit non-lawyers to practice.

The relationship between the rights of non-lawyers to practice and the power of agencies was recently discussed by the Supreme Court of the United States in the case of Sperry v. State of Florida. It will be recalled that the Sperry case involved a proceeding brought by the Florida Bar Association against a non-lawyer registered to practice before the United States Patent Office in which it was alleged that certain conduct by such non-lawyer constituted the unauthorized practice of law. The Supreme Court held that Congress had properly delegated to the Patent Office power to determine standards for admission to practice before the Patent Office and that Sperry having been so admitted could not be held to have violated a state law by virtue of the performance by him of activities sanctioned by the Patent Office pursuant to this delegation of authority.

The present legislation represents in effect an amendment of 35 U.S.C. § 31, the statutory authority on which the Supreme Court relied in the Sperry case, and of 5 U.S.C. § 261, the statutory authority in the

Secretary of the Treasury to prescribe standards for admission to practice before the Treasury Department. Since legislative amendment by indirection is involved, the Institute believes it important that the Bill make clear that the power of the agencies to admit non-lawyers is not affected or impaired by the Bill. This is particularly important in view of the statements by Donald V. Nangle, Assistant Counsel of the Senate Subcommittee which considered this legislation. In a colloquy with Mr. Thomas J. Reilly, Director of Practice of the Treasury Department, with respect to the Sperry case, Mr. Nangle said:

> "All that that case said was that it is not unconstitutional for the Congress, by legislation, to allow this Patent Office and other administrative agencies to supersede the police power of the State. It has nothing to do with our passing this bill and doing away with that or impairing it in some manner.
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> * * *
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> "I am going to agree with you what the case holds, but what my point is is there is nothing in that case that is germane here, because if we pass this bill before the subcommittee here, that will curtail in some respect this Federal--we can do anything from a legislative viewpoint we want to here." (Senate Hearings, pp. 140, 142)

Although Mr. Nangle's statement is rather

ambiguous, we do not believe that there is any intention that the proposed legislation overrule the Sperry case. It is, however, too important to be left in doubt.

Moreover, we believe it essential that the Bill expressly recognize the continuing power of the various agencies to prescribe regulations with respect to ethical behavior and with respect to the duties and obligations of practitioners before the agency. Subdivision (ii) of Section 1(c) provides that nothing in the Bill either authorizes or limits "the discipline of persons who appear in a representative capacity before any agency." We understand this to reflect the intent that the Bill preserve the existing right of an agency to discipline and disbar lawyers as well as others. The Bill provides, however, with respect to lawyers that no admission standards may be imposed by an agency.

Accordingly, the Bill presents a serious question as to the basis on which an agency may discipline or disbar a lawyer. Unless clarifying language is added to the Bill, it may be contended that an agency may not disbar a lawyer so long as the lawyer remains admitted to practice in any state. In this connection, the

Committee's attention is invited to the cases of Camp v. Herzog, 104 F. Supp. 134 (D.D.C. 1952) and Schwebel v. Orrick, 153 F. Supp. 701 (D.D.C. 1957). The first case involves the National Labor Relations Board. The second case involves the Securities and Exchange Commission. Both cases stand for the proposition that the power to disbar derives from the establishment of a bar in the first instance.

The present legislation to the extent that it precludes the various agencies from prescribing qualifications for the admission to practice of lawyers may also preclude them from disciplining and disbarring them.

The Institute understands that it is not the intention of the present legislation to remove from the various agencies the power to prescribe and to enforce by disciplinary or disbarment proceedings standards of ethical conduct by lawyers. Nonetheless, if the Bill is not clarified, there may be a serious danger that the Bill will in fact have this unintended effect.

In view of the foregoing, we suggest that a new section be added to the Bill as follows:

"Except as expressly limited by Section 1(a) hereof, the power of the respective agencies

to prescribe rules and regulations governing the recognition of, and standards of conduct by, attorneys and other persons representing others before each agency is expressly recognized."

CONCLUSION

The stated purpose of the Bill is the automatic admission of lawyers to practice before Federal agencies. We do not believe this is in the public interest insofar as the Treasury Department is concerned. In any event, the embellishments added by Sections 1(b) and 2 go well beyond the stated purpose. We believe that the Treasury Department should be exempted from the Bill. If it is not excluded, Sections 1(b) and 2 should be deleted.

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